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# Supreme Court of the United States

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**October Term, 1952**

**No. 630**

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WILLIAM SELLAS,
*Petitioner,*

vs.

JESSE KIRK, as Range Manager, Bureau of Land Management, Nevada Grazing District No. 4, Ely, Nevada,
*Respondent,*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATED JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, WILLIAM SELLAS, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States

Court of Appeals for the Ninth Circuit, rendered on the 25th day of November, 1952, and petition for rehearing having been denied by said Court on the 7th day of January, 1953, which affirmed a judgment of the United States District Court for the District of Nevada, dismissing the petitioner's Complaint on the merits.

## JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C. Sec. 1254(1).

The opinion of the Court of Appeals denying the petition for rehearing was filed on the 7th day of January, 1953. Upon stipulation of the parties at the time of appeal from the District Court, the matter is stayed until the exhaustion of petitioner's rights on appeal. (R.35).

## OPINIONS BELOW

The opinion of the District Court is reported in 101 F. Supp. 237, and is also printed in the record (R. 38).

The opinion of the Court of Appeals appears in 200 F. 2d 217 and is printed in the record (R.60).

## STATEMENT OF MATTERS INVOLVED

That petitioner, WILLIAM SELLAS, and his predecessors in interest were, and for many years have been, engaged in the business of breeding, raising, grazing and

selling livestock within Nevada and within Nevada Grazing District No. 4, Ely, Nevada. That it was and is impossible for them to own or lease all of the land needed for their business; that petitioner owned and now owns water rights and some forage lands within the said grazing district and uses public lands of the United States in said grazing district to satisfy the remainder of petitioner's grazing requirements. That petitioner's business and financial necessities make it impossible for him to continue to operate if his ability to graze his livestock and his right to do so on the public range were impaired or interfered with.

That pursuant to an Act of Congress, Chapter 865, Statutes at Large 1269, as amended by Act of June 26, 1936, Chapter 842, 49 Statutes at Large 1976, 43 U.S.C.A. Sections 315 et seq., and as further amended (Taylor Grazing Act) the Secretary of Interior established Nevada Grazing District No. 4, Ely, Nevada, and provided that the public lands therein be set aside to be used as grazing lands for livestock operators as provided for in the Act of Congress, and under the rules established under the said Act of Congress.

That in order to stabilize the livestock industry in Grazing District No. 4, Ely, Nevada, and to promote the use of the public lands for grazing in said district by affording land for leasing by livestock operators, owners of water rights, springs and water holes and forage lands dependent upon the use of the public range and to be accorded the legal

preference in granting of grazing privileges under the Taylor Grazing Act as amended (43 U.S.C.A. 1946 Ed. Supp. III, Sec. 315b) and under the rules established thereunder, petitioner was required to and did apply for a permit to graze 2,500 sheep and 200 cattle on Federal range within Nevada Grazing District No. 4, Ely, Nevada, from July 1, 1947 to June 30, 1948.

The application was allowed by the respondent, as Range Manager, for 1,000 sheep and 57 cattle. The application for the balance was rejected. The rejection of the balance of numbers sought by the petitioner to be grazed upon the public domain was arrived at by the application of a formula derived by the Range Manager whereby he compelled this petitioner to base his entire livestock operation two-thirds upon his lands and *only* one-third thereof upon his water rights.

The respondent found that the greater demand of petitioner for grazing rights under the Act of Congress was based upon his ownership of prior water and prior water rights. It was found by the respondent that petitioner's land base demand was 1,900 animal unit months and his waters were rated at 4438 animal unit months. (R. 29).

It is, therefore, apparent from the findings of the Range Manager himself that the successful operation of petitioner's livestock business depends primarily upon the use of his water rights in and to springs located upon the public domain.

The petitioner had qualified under Section 315b of the Taylor Grazing Act, and to preference in the use of said public lands for grazing as therein set forth and as set forth in the Federal Range Code adopted pursuant to the provisions of the Taylor Grazing Act (Sec. 2, 48 Statutes 1270, 43 U.S.C.A. 315a-b) and as published in 1949 edition of Federal Regulations, Title 43, part 161, page 245, et seq. During the priority years described in said Act of Congress and said regulations petitioner grazed some 2500 sheep and 200 cattle on the public domain. Petitioner has contended that his reduced herds as allowed to graze under the ruling of respondent would make it economically impossible to continue in the livestock business.

The petitioner has exhausted his administrative remedies of appeal provided for in the Taylor Grazing Act and the regulations adopted pursuant thereto.

Petitioner filed a complaint in the United States District Court for the District of Nevada against Jesse Kirk, as Range Manager, Nevada Grazing District No. 4, Ely, Nevada. Petitioner alleged the action to have arisen under the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, Chapter 324, 5 U.S.C.A. Sections 100, to 1011. The complaint sought review of the final decision of the Secretary of Interior upon the appeal of Petitioner from the rulings of the respondent upon his application for grazing permits upon the public domain.

Petitioner contended in his complaint to the District

Court that the rule and weighted formula applied to petitioner's base properties (water and land) was not authorized by the Taylor Grazing Act aforesaid, and that it was arbitrary, capricious and abuse of discretion and beyond statutory authority.

In the complaint petitioner alleged two causes of action, one for an injunction against defendant, as Range Manager, seeking to enjoin him from reducing petitioner's grazing license. Second, seeking a declaratory judgment determining petitioner's base property for qualification for grazing license, to include all his prior water, prior water rights and land as such base property as defined in the Taylor Grazing Act. (R. 3-9).

Thereafter the respondent filed a motion to dismiss petitioner's complaint upon two alleged grounds: one, the court had no jurisdiction, because no review was authorized under the Administrative Procedure Act, as the subject matter was committed to agency discretion; and, two, a failure to join the Secretary of Interior as an indispensable party.

The District Court filed its order dismissing petitioner's complaint.

The United States District Court for the District of Nevada found two reasons why the complaint should be dismissed: (R. 38).

1. That the actions of respondent were within the

agency's discretion and hence no appeal would lie under the Administrative Procedure Act, 5 U.S.C.A. Sec. 1001 et seq.

Appended to respondent's motion to dismiss was a special rule adopted for Nevada Grazing District No. 4, approved by the Secretary of Interior. (R. 33).

> "A proper factual showing of its necessity having been made by the regional grazier and it having been found that local conditions in Nevada Grazing District No. 4 make necessary the application of a special rule for the classification of base properties in order better to achieve an administration consistent with the purposes of the act, either land or water only, or a combination of land and water may be classified as base property for a single livestock operation in that district. In instances in which a combination of land and water is so recognized, the following further classification will be made:
>
> "Class 1. Land dependent by use and full-time prior water.
>
> "Class 2. Land dependent by location and full-time water."

The Court found that the above special rule was properly authorized under Sec. 161.15, Code of Federal Regulations:

> "Whenever it appears to a regional administrator that local conditions in any district in his region make necessary the application of a special rule on any of the matters in the Federal Range Code for Grazing Districts in order better to achieve an administration consistent with the purposes of the act, he may recommend such a rule, supported by a factual showing of its necessity, to the Secretary of Interior for approval."

The Court also found that the promulgated regulation was authorized by the Taylor Grazing Act (43 U.S.C.A. Sec. 315a).

2. That the Secretary of Interior was an indispensable party.

The United States Court of Appeals for the Ninth Circuit affirmed (R. 60) and held:

1. The subject matter of the action was one of agency discretion and hence not subject to review under the Administrative Procedure Act (5 U.S.C.A. Sec. 1001 et seq).

2. That the Secretary of Interior is an indispensable party and hence could not be sued in the District Court for the District of Nevada.

## QUESTIONS PRESENTED

1. Under Section 315b of the Taylor Grazing Act (43 U.S.C.A. 315b) is petitioner entitled to have his prior waters, water rights and forage lands owned by him given their full weight in granting licenses to a livestock operation, who is the owner of prior waters, water rights, and forage lands as base property, and entitled to preference under the Act of Congress.

2. Was petitioner entitled to judicial review under the Administrative Procedure Act (5 U.S.C.A. Sec. 1001 et seq) of respondent's application of a weighted formula whereby petitioner's base property was considered only to the extent

of one-third for waters and water rights and two-thirds for forage lands, when the application of such formula was neither authorized or prohibited by a special rule for Nevada Grazing District No. 4, Ely, Nevada.

3. Was the Secretary of Interior an indispensable party where the respondent, as Range Manager, alone applied the weighted formula or rule and which formula was promulgated solely by respondent, to a consideration of petitioner's application for a grazing license on the public domain.

## REASONS FOR ALLOWANCE OF WRIT

I. This case raises important questions of federal law which have not been, but should be, settled by this Court.

(a) The Taylor Grazing Act (43 U.S.C.A. Sec. 315 et seq) applies to the entire eleven western states of the United States. It is common knowledge that the livestock industry of the entire west is dependent upon the use of the public domain, millions of acres of which have been set aside by the Secretary of Interior for grazing purposes. It would not be possible for this basic industry to operate except by using public domain for grazing under licenses authorized by the aforesaid Act of Congress. The securing of feed for livestock in any other manner would economically preclude the existence of the industry. There have been no decisions of this court determining whether a Range Manager of the Bureau of Land Management, Depart-

ment of the Interior, can disregard prior water, water rights or a major portion of the same as base property when Congress has declared in Sec. 315b of the Taylor Grazing Act:

> " * * * * Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, * * *. So far as consistent with the purposes and provisions of said Sections, grazing privileges recognized and acknowledged shall be adequately safeguarded, * * *"

The Act of Congress declares the policy of use of public domain to be that of grazing. Without the use of private waters and water rights the forage can not be harvested by grazing.

(b) It is important to the livestock industry in the entire western part of the United States to have this court determine if the provisions of the Administrative Procedure Act (5 U.S.C.A. Sec. 1001 et seq) for judicial review apply where Range Managers refuse to consider all the prior base properties in grazing license applications, whether water or land.

(c) It is important to the many ranchers and raisers of livestock in the West to have determined the question of whether or not the Secretary of Interior is an indispensable party under the facts as disclosed by the record.

(d) The above questions are of general importance because the application of the Taylor Grazing Act involves all Western States included in both the Ninth Circuit and the Tenth Circuit, and relate to the construction and application of the Taylor Grazing Act and the Administrative Procedure Act.

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Petitioner

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.....

Attorneys for Petitioner

## BRIEF IN SUPPORT OF THE PETITION

The opinion of the United States District for the District of Nevada was filed on the 5th day of November, 1951, and reported at 101 Fed. Supp. 237, and the record (R. 38).

The opinion of the United States Court of Appeals for the Ninth Circuit has not been officially reported at the time of the filing of this brief, the same printed in the record (R. 60).

## JURISDICTION

The grounds on which jurisdiction of this court is invoked are set forth in the petition at page 2 thereof.

## STATEMENT OF THE CASE

The statement of the case appears in the petition at pages 2 to 8 and in the interest of brevity is not repeated here.

## SPECIFICATION OF ERRORS

The United States Court of Appeals for the Ninth Circuit erred.

1. In holding that respondent, as Range Manager, could apply a ratio of one-third allowance for petitioner's prior water and water rights and two-thirds weight to petitioner's prior forage lands in considering petitioner's application for a license to graze on the public domain in Nevada Grazing District No. 4, Ely, Nevada.

2. In holding that the application of such weighted formula by respondent was authorized by the Taylor Grazing Act (5 U.S.C.A. Sec. 315a—b) by the Range Code (Sec. 161.15) Code of Federal Regulations and the Special Rule for Nevada Grazing District No. 4, Ely, Nevada, hence committed to agency discretion and not subject to judicial review under the Administrative Procedure Act (5 U.S.C.A. Sec. 1001 et seq).

3. In holding that in order to grant relief against respondent, as Range Manager, from applying a rule promulgated by the respondent and neither authorized or prohibited by any rule approved by the Secretary of Interior, the Secretary of Interior is an indispensable party.

## STATUTES INVOLVED

The pertinent provisions of the Taylor Grazing Act, the Administrative Procedure Act, and the Range Code are set forth at the end of this brief.

## ARGUMENT

### I.

The application of the weighted rule by respondent, as Range Manager, to petitioner's base property is reviewable under the Administrative Procedure Act (Sec. 1009 U.S.C.A. Title 5) because such action was arbitrary, capricious, an abuse of discretion, and not in accordance with law; in

excess of statutory authority; and not by law within agency discretion.

Before discussing the special rule in question quoted as note 2, page 3, of Opinion of the Court of Appeals (R. 33-63) in reference to Agency discretion, the rules of the statutory scope of rule making power, should be briefly reviewed.

The policy of Congress expressed in the Taylor Grazing Act is as follows:

> "* * * Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, * * *. So far as consistent with the purposes and provisions of said Sections, grazing privileges recognized and acknowledged shall be adequately safeguarded, * * *.
>
> Sec. 315b, U.S.C.A. Title 43.

The policy of Congress is found in the following words:

"* * To insure the objects of such grazing districts, namely, to regulate their occupancy and use, and to preserve the land and its resources from destruction or unnecessary injury, *to provide for the orderly use, improvement and development of the range;* * *" (italics supplied).

Sec. 315a, U.S.C.A. Title 43.

The orderly use means for grazing purposes.

*"In order to promote the highest use of the public lands pending its final disposal, the Secretary of Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto* and/or to modify the boundaries thereof, not exceeding in the aggregate an area of one hundred and forty-two million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant land, or revested Coos Bay Wagon Road grant lands, *and which in his opinion are chiefly valuable for grazing and raising forage crops;* * * *" (Italics ours).

Title 43 U.S.C.A. Sec. 315.

The purpose of this chapter authorizing issuance of grazing permits to fully carrying capacity of public lands to owners of base lands classified as dependent by use on such public lands, is to stabilize livestock industry and to permit use of public range according to needs and qualifications of livestock operators with base holdings. The purpose was also to provide for most beneficial use possible of public range in interest of grazers and public at large, to define grazing rights by regulation against interference.

Red Canyon Sheep Co. v. Ickes, 1938, 98 Fed. 2d. 308, 69 App. D. C. 27.

But the general special rule and the application of the weight given to water rights and land base by the Range Manager espouses a broader and entirely different policy.

In Panama Refining Co. v. Ryan, 293 U. S. 388, at page 428, 55 S. Ct. 241, at page 242, 79 L. Ed. 446, at page 463, the Court said, "So, also, from the beginning of the Government, the Congress has conferred upon executive officers the power to make regulations,—'not for the government of their departments, but for administering the laws which did govern.' United States v. Grimaud, 220 U. S. 506, 517, 55 L. Ed. 563, 567, 31 S. Ct. 480. Such regulations become indeed, binding rules of conduct, *but they are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined.*" (Italics ours.) The Court referred to Field v. Clark, 143 U.S. 649, 12 S. Ct. 495, 36 L. Ed. 294, and observed the statement of principle in that case "that Congress cannot delegate legislative power, and upheld the regulation in question as an administrative rule for the appropriate execution of the policy laid down in the statute." In Schecter Poultry Corp. v. United States, 295 U. S. 495, at page 529, 55 S. Ct. at page 843, 79 L. Ed. 1570, 1580, the Court said as to the question of the delegation of legislative power: "We recently had occasion to review the pertinent decisions and general principles which govern the determination of this question. Panama Refining Co. v. Ryan, 298 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446. "The Constitution provides that 'all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. Article 1, Sec. 1. And the Congress is authorized' to make all laws which shall be necessary and proper for

carrying into execution its general power. Article 1, Sec. 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

Delegation to a board or administrative agency of authority to make regulations is not in itself constitutionally objectionable. As pointed out above, the Secretary of Interior has been the recipient of large delegated powers. But there remains the broad constitutional principle that the delegatee must keep within the delegating statute. Waite v. Macy, 246 U. S. 606, 610, 38 S. Ct. 395, 62 L. Ed. 892. In the Waite case the Court said, "No doubt it is true that this Court can not displace the judgment of the board (Tea Board) in any matter within its jurisdiction, but it is equally true that the board can not enlarge the powers given to it by statute * * *." 246 U. S. 608, 38 S. Ct. 396, 62 L. Ed. 892. If a regulation does not come within the "framework of the policy" of an unambiguous statute, it is invalid. That is the situation here, as to those regulations which furnish the basic grounds for this litigation.

The special rule approved and set forth as note 2, page 3 of the opinion of the Court of Appeals (R 63) for District 4, merely provides in essence that, where a combination of land and water is recognized, a classification will be made. It is true that the rule does not specify the weight to be given the respective bases in such combination. However, Jesse Kirk, Range Manager, applied a weighted formula to such combination. The answer of the Secretary of Interior

in his opinion (page 32, Transcript of Record), is, "The special rule for the district approved by the Secretary of Interior does not prohibit the application of this ratio * * * but it does not specify what weight shall be given to the respective bases in such combination." The determination by the district grazier to use the ratio of two-thirds one-third proposed * * * must be regarded as within the discretionary authority conferred on him by the special rule, * * *."

Petitioner contends the Taylor Grazing Act has spelled out a different policy and thus the Range Manager and/or Secretary had no such authority.

It is apparent from the record (page 29) that Sellas' land base demand was 1.990 AUMs and his waters were rated at 4438 AUMs. It is, therefore, admitted that his livestock operation was dependent primarily upon a water base and not a land base.

Section 315b U.S.C.A. Title 43 expressly states the policy of Congress that preference shall be given to land or water rights owners to permit the proper use of lands or water rights that preference shall be given to the owners of land *or* water rights in order to permit the proper use of such privately owned lands *and* water rights.

The policy of Congress as expressed in Sections 315 and 315b U.S.C.A. Title 43, was definitely threefold, in the public interest, until the public domain could be otherwise disposed of:

1. To be used for grazing.

2. To stabilize the livestock industry.

3. By preference to permit the owners of water rights and land rights, who otherwise qualified, use their water and land in the operation of their livestock business, by using the public range.

The importance of the use of public domain for grazing purposes has long been recognized by this court, first without regulation, and now under the regulation provided by Congress in the Taylor Act.

> Buford v. Houtz, 133 U.S. 320, 326, 10 S. Ct. 305, 33 L. Ed. 618.
>
> Omaechevarria v. Idaho
> 246 U.S. 343, 62 L. ed. 763 at p. 766.
> 42 Am. Jur. 797, Sec. 18.

"• • • • The purpose of the Act (Taylor Act) seems to be at least twofold. First it is designed to provide for the most beneficial use possible of the public range in the interest not only of the grazers themselves but also of the public at large. The livestock industry of the west is an important source of food supply for the people of the nation. In the arid regions of the West commercial success in the livestock industry requires that sheep and cattle be run upon the open range. This is a matter of common knowledge. Second, the Act is intended, in the interest of the stock growers themselves, to define their grazing rights and to protect those rights by regulation against interference."

> Red Canyon Sheep Co. v. Ickes,
> 98 F. 2d 308, at p. 314.

**The rights given petitioner by the Taylor Act are entitled to protection in equity against illegal acts.**

Red Canyon Sheep Co. v. Ickes,
98 F. 2d 308, p. 316 (9-10).

It is true as pointed out in the opinion that some operations require a land base in utilizing the public range. But it seems to petitioner that the Court can take judicial knowledge of the fact that many livestock operators in Nevada and other western states do not own or have ever owned any land. In the State of Nevada all waters belong to the state. Owners acquire them by prior use (vested rights) or by application to the state to acquire such rights. These property rights are owned and taxed in the same manner as real property by the states. Such water rights are usually developed springs and water holes on the public domain. These are the kind of waters, water rights, and vested water rights that Congress had in mind in Sec. 315b U.S.C.A. Title 43. Sellas had very little land, but the record discloses he had water holes so far as to make a demand of 4,438 AUMs on the public range. The Court can take judicial knowledge of the fact that no one can harvest the forage by grazing on the public domain without the use of privately owned water holes.

Cattle and sheep must have water available to live, and where great areas are available for forage on the public domain set aside for grazing, dependent upon privately owned water holes, the public purpose of use for grazing

declared in the Act of Congress cannot be accomplished without the use of such waters. Likewise the water holes on the public domain are absolutely useless to a livestock operator unless his livestock which drink there are permitted to eat the grass growing on the public domain surrounding those water holes. Fully aware of the fact that the purpose of the act to utilize the public domain for grazing could not be accomplished without the use of privately owned water holes and springs, Congress required water and water rights to be regarded as base property the same as hay raising lands on the home ranches. Congress knew that, if water and water rights were disregarded, there would be large areas of the public domain unusable for grazing, for Sellas and other operators could prevent any other person, including the United States, from using his or their water holes and springs, even if located wholly upon public domain.

Local custom in using public domain for grazing prior to Taylor Act recognized that it was wholly dependent in many areas on use of private water and water holes and springs which were protected against trespass in most western states.

It is apparent, therefore, that Jesse Kirk, Range Manager, exceeded in the application of the two-thirds one-third formula the policy of the statute and therefore could not have been authorized by the special rule approved by the Secretary of Interior to do so.

It is pointed out in the opinion of the Court of Appeals (R. 64):

> "Following the adoption of the Special Rule all base properties in the district were adjudicated. As regards appellant, it was found that his land base had a demand on the range for 1990 animal-unit months, and his waters were rated at 4,438 animal-unit months. Applying the ratio of two-thirds land and one-third water, appellant's privileges were determined to be 2,985 animal-unit months in Class 1. At the same time, all operators in the District were required to take a 10% cut in their class 1 grazing privileges in order that the recognized demand be adjusted to the available range. The net result was that appellant's privileges were reduced to the equivalent of 1000 sheep and 57 cattle, 87% on the Federal Range." Then the Court concluded: (R. 65):

> "He observed that employment of the ratio affected all operators alike, hence appellant had no cause for complaint."

Petitioner contends that this is not correct from the record because the application of the ratio would only amount to equal treatment when each rancher had the same ratio of land and water. The rule applied by the Range Manager could not possibly effect all operators alike. The truth of this statement may be illustrated by two examples:

1. Rancher Smith has 1000 acres of private land and only five water holes on the public domain, and ran 3000 head of sheep on the public domain for many years before the passage of the Taylor Grazing Act.

2. Rancher Jones has only 360 acres of private land

but he has 50 water holes scattered over a large area of the public domain, and he also ran 3000 head of sheep on the public domain for many years before the passage of the Taylor grazing act.

It is apparent that if the formula used by the Range Manager against Sellas, the petitioner, were applied to Smith and Jones above, the number of livestock allowed Smith on the public range may be increased while the number allowed to Jones would be greatly reduced.

The facts of this case should be fully developed at a trial by both the government and petitioner and subject to review under the Administrative Act of Congress in order that the actual facts concerning whether or not the petitioner has a legal complaint may be shown. Whether or not this petitioner was treated the same as other operators in the district can be determined only by a fair trial upon the merits.

There has been no trial upon the merits to date. After this petitioner has had his day in court, should it develop that the application of the formula was within agency discretion, it will then be time enough for the court to dismiss the action upon the ground the conduct of the Range Manager is not reviewable.

Without the advent of the Administrative Procedure Act it would have been possible for the Petitioner to have asked a Federal Court of equity to afford him the remedy asked in this complaint. This is the complete answer to

the contention that we are not afforded the right to resort to the Courts in the present instance where property rights of the petitioner are being injured *without due process of law* and in contravention of the Taylor Act itself. Furthermore, this case does not involve the discretion of the Respondent or his superior to refuse or grant an application for grazing permits or a refusal to grant the same in part; it involves a disregard of the standards for the granting of such permits and licenses laid down in the Taylor Act of Congress.

"The Judicial review provisions of the Administrative Procedure Act have been held, at least insofar as availability of review is concerned, to be declaratory of previously existing law. From this it follows that judicial review is available where it has, traditionally, been afforded in the face of a provision in the applicable statute that the administrative officer's decision shall be final, despite the statement of the Administrative Procedure Act that its judicial review requirements apply only where agency action is not by law committed to agency discretion.

"The Administrative Procedure Act excludes from judicial review all government action affecting the public generally but not impinging on the legal rights of any individual; but where an individual's rights are adversely affected, judicial review may be had in any case, unless the action is taken under a statute precluding review, or unless the agency action is by law committed to agency discretion."

94 L. Ed. 634 (Anno.)

We submit that even without the Administrative Procedure Act, petitioner is entitled to review of agency action in this case:

"* * * When Congress passes an Act empowering administrative agencies to carry on government activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instance is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction (Cf, United States v. Morgan, 307 U.S. 183, 190, 191, 83 L. Ed. 1211, 1216, 1217, 59 S. Ct. 795). This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management. But under Article 3, Congress established courts to adjudicate cases

and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."

> Stark v. Wickard, 321 U.S. 288, at p. 311, 88 L. Ed. at 748.

Thus there is a right to review because the question is whether the action of the Respondent in considering only a portion of Petitioner's water as base property is or is not beyond the scope of the Taylor Act. We contend that the action is illegal and not discretionary, because the Act requires preference to be given to those ranchers engaged in the livestock business or owners of water or water rights, as may be necessary to permit the proper use of land, water or water rights owned, occupied or leased by them irrespective of whether an operator had much land and few water holes on public domain or little land and many water holes. The purpose of the Act was to preserve and to stabilize existing livestock operations. Congress knew when it enacted the law, that these livestock units had been built up by trial and error in respect to the relation of private lands owned and waters used by each rancher in the profitable operation of his outfit.

> Sec. 315b, USCA Title 43.

Our point is that grazing permits may be limited as to numbers, but only after rights are determined by base property of land, water and water rights of the owners of such property in the district. After such determination

of prior water and land base, the forage be not available on the range, then all livestock operators are to take a percentage cut in number. This is permitted by the code and by the Taylor Act.

> "* * * During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is authorized, in his descretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists.* *"

Certainly such land and water rights cannot be disregarded by the Range Manager, Kirk, and upon the contention that such is authorized under Range Code (43 C. F. R. 161.15) where special rules may be made as that would violate the plain language of the Taylor Act, Sec. 315b, Title 43, U.S.C.A.

This clearly is within scope of review under Sec. 1009e, Title 5, U. S. C. A. (Administrative Procedure Act):

Petitioner respectfully contends the rule in the case of Williams v. Fanning, 332, U.S. 490, 493, 92 L. Ed. 98, leads to but the conclusion that any decree of judgment in this case, "will effectively grant the relief desired by expending itself on the subordinate official who is before the court," to-wit, Jesse Kirk, Range Manager. This conclusion is founded on the record (R. 32):

> "The special rule for the district approved by the Secretary of the Interior does not prohibit the applica-

tion of this ratio. That rule authorized the combination of the two types of bases in adjudicating livestock operations, *but it does not specify what weight shall be given* to the respective bases in such a *combination.* The *determination by the district grazier* to *use* the ratio of two-thirds one-third proposed by the Advisory Board for the district *must be regarded as within the discretionary authority conferred on him by the special rule* * * *." (Italics ours).

The special rule approved by the Secretary did not prescribe the weighted formula to be applied by Jesse Kirk, Range Manager, nor was he directed by his supervisors to do so. It was at most not prohibited and contended to be within *his* discretion. Of course, if such formula were beyond the framework of the Act of Congress it was invalid. But it was his act alone, arbitrary, capricious, an abuse of discretion and beyond statutory authority. Any decree entered against Kirk as Range Manager would afford the relief without requiring his superior to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him.

The rule is, that where the plaintiff in an action is not seeking to prevent subordinates from executing a discretionary order of their superior but are challenging the power of the superior to make the regulation, it is not necessary to have the superior before the court.

American School of Magnetic Healing v. McAnnulty
187 U.S. 94, 23 S. Ct. 33, 47 L. Ed. 90;

Public Clearing House v. Coyne, 194 U.S. 497, 24 S. Ct. 789, 48 L. Ed. 1092;

Swigart v. Baker, 229 U.S. 187, 33 S. Ct. 645, 57 L. Ed. 1143; State of Missouri v. Holland, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641;

Colorado v. Toll, 268 U.S. 228, 230, 45 S. Ct. 505, 69 L. Ed. 927; Brooks v. Dewar, 313 U.S. 354, 360, 61 S. Ct. 979, 85 L. Ed. 1399;

From the record in this case and the facts set forth in this petition, the following conclusions are glaringly apparent:

1. That the formula offered by the Range Manager is contrary to the express provisions of the Taylor Grazing Act.

2. That the formula offered by the Range Manager defeats the purpose of the Taylor Grazing Act in that instead of stabilizing the petitioner's livestock operation, it reduces his number of livestock so low he cannot continue to operate without a loss, as his fixed overhead will be greater than his gross income.

3. The formula further defeats the purpose of the Act in that it deprives the petitioner of the use of his water holes by denying him the right to have his livestock watered there to graze upon the surrounding public domain and, therefore, the formula applied by the Range Manager takes the property of this petitioner without due process of law.

4. By a dismissal of this petitioner's complaint upon a pre-trial motion to dismiss this petitioner has been denied his day in court as there has been no trial upon the merits to determine the actual facts involved in this controversy.

5. Only by a trial upon the merits can it be determined:

(a) Whether or not under the special rule approved by the Secretary of the Interior this formula applied by the Range Manager was a proper classification in instances in which a combination of land and water is used as a base property;

(b) Whether or not the formula applied deprives this petitioner of his right to use his privately owned water holes in connection with the forage on the public range adjacent thereto so as to permit "the proper use of his privately owned lands, water and water rights."

It is therefore, respectfully submitted that this Petition for a Writ of Certiorari should be granted by this Honorable Court

Respectfully submitted,

.....

Ernest S. Brown

.....

Clel Georgetta

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10 State Street,
Reno, Nevada.

## APPENDIX

1. Pertinent portions of the Taylor Grazing Act of June 28, 1934, as amended, 43 U.S.C. Sec. 315, et seq., are as follows:

SEC. 1 (43 U.S.C. Sec. 315) In order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of one hundred and forty-two million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States * * * *, and which in his opinion are chiefly valuable for grazing and raising forage crops: * * *"

SEC. 2 (43 U.S.C. Sec. 315 (a) ). The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of section 315 of this title, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of sections 315-315m, 315n, 315o and 315o-1 of this title and to insure the objects of such grazing districts, namely to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and deveolpment of the range; * * * "

SEC. 3 (43 U.S.C. Sec. 315 (b) ). The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to partici-

pate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time, and in fixing the amount of such fees the Secretary of the Interior shall take into account the extent to which such districts yield public benefits over and above those accruing to the users of the forage resources for livestock purposes. Such fees shall * * * Grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws, and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permitees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time the numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is authorized in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing

fees for such depletion period so long as the emergency exists: Provided further, That nothing in sections 315-315m, 315 u, 315o-1 of this title shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which as heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of said sections, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of such sections shall not create any right, title, interest, or estate in or to the lands.

2. Pertinent portions of the Federal Range Code for Grazing Districts, 43 C.F.R., part 161, are as follows:

SEC. 161.1 Introductory; basic policy and plan of administration.

(a) Purpose; general requirements. Grazing districts will be administered to conserve and regulate the public grazing lands, to stabilize the livestock industry dependent upon them, and in aid thereof to promote the proper use of the privately controlled lands and waters dependent upon those public grazing lands. In furtherance of these objectives, grazing privileges will be granted with a view to the protection of those livestock operations that are recognized as established and continuing and which normally involve the substantial use of the public range in a regular, continuing manner each year. To promote the highest use of the public lands within grazing districts which have been or hereafter are established, possession of sufficient land or water to insure a year-round operation for a certain number of livestock in connection with the use of the public domain will be required of all users.

(b) Preference applicants. Preference in the granting of grazing privileges will be give to those applicants within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, ocupied, or leased by them. When the demands of all such preference applicants cannot be satisfied, prior consideration will be given applicants in the manner provided in this section. Provisions will be made for other applicants so far as Federal range remains available. * * *

* * * * * * *

SEC. 161.2 Definitions. Whenever used in rules, instructions, or interpretations issued by the Bureau of Land Management, unless the context otherwise requires:

* * * * * *

(d) "Property" means privately owned or controlled land or water used in range livestock operations.

(e) "Base property" means property used for the support of the livestock for which a grazing privilege is sought and on the basis of which the extent of a license or permit is computed.

* * * * * *

(l) Prior water is water which during all or a substantial part of the five-year period immediately preceding June 28, 1934 (referred to in this part as the "priority period"), was used to service certain public range within the service area of the water for a livestock operation that was established, permanent, and continuing, and which during the period of such use, normally involved the grazing of livestock on the same areas of public land for a certain period or periods of each year,

* * * * * *

(k) "Full-time water" means water which is suitable for consumption by livestock and available, accessible, and adequate for a certain number of livestock during those months in the year for which the range is classified as suitable for use. Such water may be from one source or may be the aggregate amount available from several sources.

SEC. 161.6 Issuance of licenses and permits.

* * * * * *

(b) Regular licenses and permits; order of issuance. number of livestock. Regular licenses and permits will be issued to qualified applicants to the extent that Federal range is available in the following preference order and amounts:

(1) To applicants owning or controlling land in class 1, licenses or permits to the extent of the dependency by use of such land; to applicants owning or controlling water in class 1, licenses or permits to the extent of the priority of such water.

(2) To applicants owning or controlling land or water in class 2, licenses or permits for the number of livestock for which range is available and which can be properly grazed in connection with a livestock operation which involves the use of such land or water.

(3) To other applicants, licenses, or permits for the number of livestock for which range is available and which can be properly grazed without detriment to the operations on the range of applicants owning or controlling base properties in class 1 and class 2.

EC. 161.15 Special Rules for grazing districts. Whenever it appears to a regional administrator that local conditions in any district in his region make necessary the application of a special rule on any of the matters in the Federal Range Code for Grazing Districts in order

to achieve an administration consistent with the purposes of the act, he may recommend such a rule, supported by a factual showing of its necessity, to the Secretary of the Interior for approval.

3. Pertinent portions of the Administrative Procedure Act, (5 U.S.C.A. Sec. 1009 et seq.), are as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute shall be entitled to judicial review thereof.

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory

order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * * * * *

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required b ylaw; (5) unsupported by substantial evidence in any case subject to the requirements of section 1006 and 1007 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Legislative History of Administrative Procedure Act:

"Section 10 on judicial review does not apply in any situation, so far as there are involved matters with respect to which statutes preclude judicial review or agency action is by law committed to agency discretion.

"This section requires adequate, fair, effective, complete, and just determination of the rights of any person in properly invoking proceedings.

"Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such case statutes would in effect be blank checks drawn to the credit of some administrative officer or board. The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill, a statute, if not specific, in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. *The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.*

"Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning. *But that does not mean that questions of law properly presented are withdrawn from the reviewing courts.* Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative act but must be treated by the revision of statutes conferring administrative powers. *However, where statutory standards, definitions or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record.* In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him pro tanto from prevailing therein." (Italics ours).

Legislative History, 1944-46, Administrative Procedure At, p. 275; 79th Cong. 26 July, 1946, Senate Document No. 248.

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# In the Supreme Court of the United States

OCTOBER TERM, 1952

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No. 630

WILLIAM SELLAS, PETITIONER

*v.*

JESSE KIRK, AS RANGE MANAGER, BUREAU OF LAND MANAGEMENT, NEVADA GRAZING DISTRICT NO. 4, ELY, NEVADA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR RESPONDENT KIRK IN OPPOSITION

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### OPINIONS BELOW

The district court's opinion (R. 38-47) is reported at 101 F. Supp. 237. The opinion of the court of appeals (R. 60-68) is reported at 200 F. 2d 217.

### JURISDICTION

The judgment of the court of appeals was entered November 25, 1952 (R. 68-69). A petition for rehearing was denied January 7, 1953 (R. 69). The

petition for a writ of certiorari was filed February 28, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether a complaint, naming only a district range manager as defendant and seeking review of a partial denial of an application for a grazing permit under the Taylor Grazing Act, was properly dismissed on the grounds that:

(a) The action on the application was not reviewable under the Administrative Procedure Act or any other statute; or

(b) The Secretary of the Interior was an indispensable party.[1]

### STATUTES INVOLVED

1. Section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 243, 5 U.S.C. sec. 1009, provides in part:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

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[1] In the event the petition should be granted the further question would be presented whether this action constitutes an attempt to sue the United States without its consent.

2. Pertinent portions of the Taylor Grazing Act are set out in the Appendix, pp. 16-18 *infra*.

## STATEMENT

The judgment sought to be reviewed affirmed the dismissal of an action brought by the petitioner to enjoin the Range Manager for Nevada Grazing District No. 4 from effecting a reduction in petitioner's permitted grazing on public lands within the grazing district. The complaint also sought a declaratory judgment that the respondent is obliged to consider the petitioner's prior water and water rights in determining the quantum of his grazing privileges (R. 8). The factual background, as summarized by the court below (R. 61-65), is as follows:

Nevada Grazing District No. 4 was established by the Secretary of the Interior in 1936 (R. 4, 28, 61-62). During the priority period[2] petitioner had grazed some 2,500 sheep and 200 cattle on the public domain in the area (R. 6, 28, 62). After 1936, he was granted licenses[3] to graze as many as 2,000 sheep and 75 cattle in some years, and in 1943, a 10-year permit was issued to him for that

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[2] The "priority period" is defined in the Federal Range Code, 43 C.F.R. sec. 161.2(g), as "the 5-year period immediately preceding June 28, 1934," the date of enactment of the Taylor Grazing Act.

[3] As explained in the Federal Range Code, 43 C.F.R. sec. 161.1(c), licenses are issued on a temporary basis from year to year pending the gathering of the data to support the regular permits contemplated by Section 3 of the Taylor Grazing Act. See *Brooks* v. *Dewar*, 313 U. S. 354.

number of livestock (R. 28, 62). These privileges were granted during the time when an attempt was being made to work out a proper classification of base properties [4] and before commensurate property surveys for the district had been completed (R. 28, 62). His permit, which was subject to termination, was cancelled on August 2, 1946, under the following circumstances (R. 29, 62):

Nevada Grazing District No. 4 is what is known as a transitional area, that is, an area lying between one which requires a land base for livestock operations and one which requires a water base for such operations (R. 27, 62). The Federal Range Code, 43 C.F.R. sec. 161.4, requires that base properties be classified as land *or* water (R. 27, 62). Because of the transitional character of the area it was impossible to establish a satisfactory base for the classification of the property in the district under the existing regulations (R. 27, 62-63). Accordingly, in 1944, the Advisory Board [5] of the district adopted a resolution recommending that, in the determination of the proper use of base properties

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[4] " 'Base property' means property used for the support of the livestock for which a grazing privilege is sought and on the basis of which the extent of a license or permit is computed." 43 C.F.R. sec. 161.2(e).

[5] Pursuant to Section 18 of the Taylor Grazing Act, 43 U.S.C. sec. 315o (1), the Advisory Board, with the exception of a wildlife representative selected by the Secretary of the Interior, is composed of local stockmen elected by the users of the range in the district. Its function is to make recommendations concerning each application for a grazing permit, rules and regulations for the administration of the Act, and any other pertinent matters. See also Federal Range Code, 43 C.F.R. sec. 161.12.

of applicants and their relative dependence upon the Federal range, owned or controlled dependent land *and* prior water be recognized as base property, but that total grazing privileges be based on at least a two-thirds land base and not to exceed a one-third water base (R. 27, 63). In 1945, the Secretary of the Interior, pursuant to the recommendation of the Advisory Board, promulgated the following special rule for the district (R. 27-28, 33, 63):[6]

> A proper factual showing of its necessity having been made by the regional grazier and it having been found that local conditions in Nevada Grazing District No. 4 make necessary the application of a special rule for the classification of base properties in order better to achieve an administration consistent with the purposes of the act, either land or water only, or a combination of land and water, may be classified as base property for a single livestock operation in that district. In instances in which a combination of land and water is so recognized, the following further classification will be made:
>
> Class 1. Land dependent by use and full-time prior water.

---

[6] The Federal Range Code, 43 C.F.R. sec. 161.15, provides:

> Whenever it appears to a regional administrator that local conditions in any district in his region make necessary the application of a special rule on any of the matters in the Federal Range Code for Grazing Districts in order better to achieve an administration consistent with the purposes of the act, he may recommend such a rule, supported by a factual showing of its necessity, to the Secretary of the Interior for approval.

Class 2. Land dependent by location and full-time water.

Following the adoption of the special rule, all base properties in the district were adjudicated, it being found that the petitioner's land base had a demand on the Federal range for 1,990 AUM's[7] and his waters were rated at 4,438 AUM's (R. 29, 64). Applying the ratio of two-thirds land and one-third water, the petitioner's privileges were determined to be 2,985 AUM's in Class 1 and 3,443 AUM's in Class 2 (R. 29, 64), the Class 2 privileges being of no consequence here because there was no range available for such privileges (R. 26, 64). At the same time, all operators in the district were required to take a 10 percent cut in their Class 1 grazing privileges in order that the recognized demand might be adjusted to the available range (R. 29, 64). This resulted in the petitioner's Class 1 grazing privileges being reduced to 2,686 AUM's, the equivalent of 1,000 sheep and 57 cattle, 87 percent on the Federal range (R. 29, 64). He filed an administrative appeal from that adjudication, but later withdrew his appeal (R. 29, 64).

His 10-year permit for 2,000 sheep and 75 cattle having thus been canceled (R. 29, 64), the peti-

[7] AUM is the abbreviation for Animal-Unit Month, which "as applied to lands that are base properties, means the amount of natural or cultivated feed necessary for the complete sustenance of one cow for a period of one month; as applied to Federal range, it means that amount of grazing privileges represented by the grazing of one cow for a period of one month. For the purpose of this definition, one cow will be considered the equivalent of one horse or five sheep or five goats." Federal Range Code, 43 C.F.R. sec. 161.2(i).

tioner applied for a permit to graze 2,500 sheep and 200 cattle for the period from July 1, 1947, to June 30, 1948 (R. 5, 26, 64-65). This application was granted by the Range Manager as to 1,000 sheep and 57 cattle, but was rejected as to the balance because it was in excess of the adjudicated qualifications of the petitioner's base property for Class 1 grazing privileges and because there was no range available for Class 2 privileges (R. 5, 26, 65). The petitioner protested the action of the Range Manager and, after a hearing before an examiner of the Bureau of Land Management, the Associate Director of the Bureau affirmed the action taken (R. 26-27, 65). The petitioner thereupon appealed to the Secretary of the Interior, who on June 15, 1950, affirmed the manager's decision (R. 25-32, 65). The Secretary held that, since the special rule did not prohibit the use of the two-thirds and one-third ratio as proposed by the Advisory Board, the use of such ratio must be regarded as within the discretion of the Range Manager, and that, since the ratio has been uniformly applied to all operators in the district with a combination of land and water bases, the petitioner had no cause to complain (R. 32, 65).

On November 6, 1950, the petitioner filed the instant complaint, asserting jurisdiction under the Administrative Procedure Act (R. 3), naming the Range Manager as the sole defendant (R. 3), alleging that the partial rejection of his application was arbitrary, capricious, an abuse of discretion, and in excess of statutory authority (R. 5), and

praying that the Range Manager be restrained from compelling petitioner to reduce his herds on the public domain, and that it be declared that the Range Manager must consider petitioner's prior water, together with his land base, in determining his base property, so that petitioner would be entitled to graze 2,500 sheep and 200 cattle (R. 8). The Range Manager moved to dismiss on the grounds that the district court did not have jurisdiction under the Administrative Procedure Act or any other statute, and that the Secretary of the Interior was an indispensable party (R. 11). In support of the motion to dismiss there was later filed an affidavit by the Regional Chief, Division of Range Management, Bureau of Land Management, Department of the Interior (R. 12-15), which incorporated by reference (R. 14) the opinion of the Secretary of the Interior on the administrative appeal (R. 25-32).

The district court dismissed the action (R. 47-48), holding that the adoption and application of the special rule for the grazing district "was agency action committed by law to agency discretion," and hence not reviewable, and that if such action were reviewable, the Secretary of the Interior was an indispensable party (R. 40-46). Upon appeal, the judgment of dismissal was affirmed upon both grounds (R. 60-69), and a petition for rehearing was denied on January 7, 1953 (R. 69).

ARGUMENT

1. The petitioner has based his claim of jurisdiction solely upon the provisions of the Adminis-

trative Procedure Act and has made no other jurisdictional averments (R. 3). The holding of the court below that the matter complained of was not reviewable under such Act because it was "agency action committed by law to agency discretion" is clearly correct. The Taylor Grazing Act delegates broad power to the Secretary of the Interior to "make such rules and regulations * * * and do any and all things necessary" to regulate the use and occupancy of grazing districts (43 U. S. C. sec. 315a), and "to issue or cause to be issued" grazing permits to such persons "as under his rules and regulations are entitled to participate in the use of the range" (43 U. S. C. sec. 315b). In turn he has delegated to range managers authority "to issue or to refuse to issue a grazing license or permit," 43 C.F.R. sec. 161.9(c).[8] It is thus plain that, absent any unauthorized or illegal conduct, the action of respondent range manager in denying in part petitioner's application involved such discretion as to be exempt from the judicial review provisions of the Administrative Procedure Act. *Oman* v. *United States,* 195 F. 2d 710 (C.A. 10); *Chournos* v. *United States,* 193 F. 2d 321, 323-324 (C.A. 10), certiorari denied, 343 U. S. 977; *Lansden* v. *Hart,* 180 F. 2d 679, 682-683 (C.A. 7), certiorari denied, 340 U. S. 824.

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[8] 43 C.F.R. sec. 161.9(c) provides:

> The range manager is vested with the authority in the light of all facts and circumstances, after first having submitted an application to the district advisory board, to issue or to refuse to issue a grazing license or permit. * * *

Petitioner makes no claim that Congress has unlawfully delegated authority to the Secretary (Pet. 17-18), nor even that the general regulations set forth in the Federal Range Code are unauthorized and invalid, but claims only that the special rule, applying a ratio to his land and water, is illegal as contrary to the preference provisions of section 3 of the Taylor Grazing Act (43 U.S.C. sec. 315b) (Pet. 9-10, 14-28). However, that part of section 3 relied upon merely established a preference in favor of those owning land or water in or near the district over nomadic operators,[9] and did not, as petitioner contends (Pet. 27-28), restrict the authority of the Secretary to the sole function of determining the amount of prior use by those with such preference and then reducing the grazing of all proportionally so that the total permitted use would not exceed the carrying capacity of the federal range. Such a restriction would not be in accord with good range management or promote the highest use of the public lands in that stock permitted on the public lands because of the ownership of water would necessarily obtain all their forage

[9] It is to be noted that in this case there is no allegation that this preference right of appellant has been violated by the granting of permits to others not having the same preference right. For this reason the case of *Red Canyon Sheep Co. v. Ickes*, 98 F. 2d 308 (C.A. D.C.), relied upon by petitioner (Pet. 20-21), is not in point here. In that case the plaintiff allegedly had grazing privileges in the form of licenses, and the act complained of was not, as here, the denial of an application. Rather, the illegal action enjoined was the transfer to a third party, having no prior connection with the grazing district, of title to the lands under license to plaintiff in exchange for lands outside of the district.

on the public lands and would impose a greater burden than stock which could graze part of the time on private lands. Neither would it be conducive to stability in the livestock industry since cuts in the permitted use of all operators could well result in reducing the productivity of each unit to such a low level that no unit could be economically operated. Obviously, Congress had no intention to tie the Secretary's hands in such manner, and the special rule and its application are well within his delegated authority.

Inasmuch as in most grazing districts, as is the case in the district here involved (R. 26, 29), there was not sufficient federal range to satisfy the demands of all operators with preference rights, it was necessary to develop, with consideration of the purposes of the Taylor Grazing Act, a system of priorities among those having preference. This the Secretary has done in the Federal Range Code, 43 C.F.R. secs. 161.1(b), 161.2, 161.4, 161.5 and 161.6(b), the first priority going to those who had made prior use of the public range, to the extent that their use was customary and in accord with good range management.[10] See 56 I. D. 62.

But before any regular permits could be issued in any district it was first necessary to make an exhaustive survey of the public and private lands in the area to determine how the federal range could be most efficiently and economically used in live-

[10] Contrary to petitioner's assumption (Pet. 23-24), an operator's recognized Class 1 privileges could not be in excess of his grazing prior to the Act. See 43 C.F.R. sec. 161.2(g) and 161.2(l).

stock operations in combination with the private lands. See Annual Report of the Secretary of the Interior (1937) pp. 103, 107. Such surveys entailed a determination as to the carrying capacity and season of use of the federal range, and a determination as to the proper relationship between the public and private lands. After consideration of land and water conditions and other factors affecting livestock operations in accordance with customary use and best practices for good range management, the range manager was to classify base properties as either land *or* water (43 C.F.R. sec. 161.4), according to whether the public range required land or water for successful livestock operations (see R. 27). Thus, in an area where there was sufficient water on the federal range, so that land was the prime requisite for the development of the public lands, only land could be considered as a base property, and the owner of water would not be entitled to a permit until after the demands of all owners of land were satisfied. See 57 I. D. 213, 214; 58 I. D. 419, 421; 58 I. D. 686, 691. In such circumstances water would be given no weight in determining the relative dependency of properties on the federal range and the proper relationship between the federal range and private properties. Such a result is clearly within the Secretary's delegated authority to issue permits to those operators who are, under his regulations, entitled to participate in the use of the range (43 U.S.C. sec. 315b). It is just as clear that when, as here, it

is not possible to determine that water should be given no weight, a special rule may be lawfully promulgated to assign appropriate weight to water used in combination with land. And all determinations leading to the result must necessarily be left to the sound discretion of the administrative officials and, therefore, not subject to judicial revision.

2. It is equally clear that the courts below correctly held that the Secretary of the Interior was a necessary party (R. 45-46, 67-68). The only defendant before the court is the range manager of the grazing district, a subordinate of the Secretary. A decree enjoining the subordinate from compelling the petitioner to reduce his grazing on the public domain will offer no effective relief to the petitioner, since any grazing in excess of that now permitted would be unlawful and subject the petitioner to criminal prosecution or civil suit. Section 2, Taylor Grazing Act, 43 U.S.C. sec. 315a; 43 C.F.R. sec. 161.10(a). Thus, the subordinate's enforced nonaction would not in any fashion extend to petitioner any greater privileges on the public lands than are now recognized. It is plain, therefore, that only a permit for grazing privileges in excess of those allowed by his current permit will afford the desired relief (R. 8). The petitioner argues (Pet. 28-29) that the relief he desires could be obtained solely by action of the Range Manager disregarding the weighted formula authorized by the special rule. But this ignores the Secretary's finding that local conditions in this grazing dis-

trict required the use of a special rule (R. 33).[11] Inasmuch as the federal range in the grazing district has been fully allocated to qualified users on that basis (R. 26, 29, 31), acceptance of petitioner's contention would require the adoption of some other special rule for the district and reclassifying and readjudicating all the base properties in the district accordingly.[12] This would require direct action by the Secretary in the promulgation of the special rule (43 C.F.R. sec. 161.15), and thereafter his indirect action in the reclassifying, readjudicating and issuing of permits by his subordinates. Obviously, by his suit petitioner is seeking to control the action of the Secretary of the Interior, and the Secretary is therefore an indispensable party. *Williams* v. *Fanning,* 332 U. S. 490, 493-494; *Warner Valley Stock Company* v. *Smith,* 165 U. S. 28, 34; *Gnerich* v. *Rutter,* 265 U. S. 388, 391-393; *Webster* v. *Fall,* 266 U. S. 507, 510-511.

3. The disposition of this case on either of the alternative grounds does not involve any conflict with the applicable decisions of this Court, and on the only point on which this Court has not spoken, i.e., whether or not the granting or denial of grazing permits is "agency action committed by law to agency discretion," the only other court of

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[11] As the court below pointed out (R. 65), the petitioner does not question the authority of the Secretary to promulgate special rules thought appropriate because of conditions obtaining in a particular district.

[12] This raises the question whether the other permittees in the district are also necessary parties. See 43 C.F.R. sec. 161.6(c)(13).

appeals in which the question is likely to arise (see Pet. 11) is apparently in agreement with the court below. *Chournos* v. *United States,* 193 F. 2d 321, 323-324 (C.A. 10), certiorari denied, 343 U. S. 977; *Oman* v. *United States,* 195 F. 2d 710, 711 (C.A. 10). And since there is no dispute as to any material facts, it is clear that a trial on the merits could not change the result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1953.

APPENDIX

Pertinent portions of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 49 Stat. 1976, 43 U. S. C. sec. 315, *et seq.*, are as follows:

SEC. 1 (43 U. S. C. sec. 315). That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof * * *.

SEC. 2 (43 U. S. C. sec. 315a). The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; * * * and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500.

SEC. 3 (43 U. S. C. sec. 315b). That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze

livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, * * *. grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers

of stock and seasons of use. * * * So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands.

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